without notice to him the Manager caused his house to be demolished by sawing through the uprights embedded in the ground, with the result that the house collapsed and some poultry escaped and was lost.

It is here that I think the Manager was wrong. Though Ng Hock Su had given the Estate just grounds to expel him, and though he was probably no more than a tenant at will, he was nevertheless entitled to notice of the Estate's intention to expel him and a reasonable time to demolish his house and remove his goods, which is as Willis, J. said in *Cornish* v. *Stubbs* 5 C.P. at p. 339 a right annexed by law in the case of a tenant at will. It was not seriously argued that the house is not moveable property. I think it is generally conceded that such houses are. But whether they are or not, is not essential to this conviction because mischief was committed to the live-stock. However the act of mischief is laid in the charge as "pulling down an attap dwelling house and poultry shed" and I think that correctly represents the offence.

The appellant cannot plead that he did this *bona fide*, because he has made a mistake not of fact but of what his legal powers are to enforce the contract and is not within the protection of section 79 of the Penal Code.

I think therefore he was correctly convicted and I dismiss the appeal.

*Appeal dismissed.*

Solicitors for Appellant: *Rodyk & Davidson.*

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[COURT OF CRIMINAL APPEAL]
WHITLEY, TERRELL & GORDON-SMITH, JJ.
October 5, 1935.

## REX v. VELAYUTHAN

[CRIMINAL APPEAL No. 4 of 1935]

*Ordinance No. 53 (Evidence), Section 157—uncorroborated evidence.*

In cases of sexual offences such as rape where evidence is given by a young girl the Court must be satisfied that the danger of convicting upon the uncorroborated evidence of the girl was present to the minds of the jury. Acceptance of the unsworn evidence of the child should be subject to the same principles of rules of practice as apply to the acceptance of the evidence of accomplices.

*Lee Mion* v. *Public Prosecutor*, 3 Mal. L.J. 124 followed.

Petition referred by H.E. the Governor to the Court of Criminal Appeal under Section 21 (a) of Ordinance No. 5 of 1931 (Court of Criminal Appeal).

The facts and arguments are sufficiently set out in the Judgment of the Court.

*Goho*, for Appellant.

*Worley*, Deputy Public Prosecutor, for Crown.

At the conclusion of the hearing the Court allowed the appeal and quashed the conviction intimating that they would give their reasons in writing later. The judgment of the Court comprising Whitley, Terrell and Gordon-Smith, JJ. was delivered by Whitley, J.

*Cur. Ad. Vult.*

**WHITLEY, J.**—This was a Petition referred by His Excellency the Governor to the Court of Criminal Appeal under section 21 (a) of Ordinance No. 5 of 1931 (Court of Criminal Appeal).

The Appeal was heard by us on the 5th day of September when we allowed the Appeal and quashed the conviction, intimating that we would give our reasons in writing later.

The Appellant was tried on a charge of rape before Burton, Acting Chief Justice, with a Common Jury, on the 24th day of April, 1935, and he was found guilty by a majority of six to one. The learned Acting Chief Justice agreed with the verdict of the majority, and the Appellant was convicted and sentenced to Five Years' Rigorous Imprisonment.

The case for the prosecution depended almost entirely upon the evidence of the complainant, a Tamil girl about ten years of age named Govindammah. According to her the Appellant had sexual intercourse with her at the house in which she lived upon a number of occasions during the week or weeks prior to the 11th day of March, 1935 on which date she left the coolie lines, being found some days later in Malacca.

She was the adopted child of the Appellant and his mistress Mangatal, and lived with them in an isolated attap house. During the period in question Mangatal and her adopted son Krishnan (brother of the Complainant) were not sleeping in this house, but used to pay frequent visits. The only persons who slept in the house were the Appellant, the Complainant, and a man named Pusari whose age was given as 40 to 50, and who was referred to by the witnesses as "the old man." This man was not called as a witness.

According to the girl the offences were committed during the night. In view of her age the question of whether or not she consented was immaterial. She left the house on the 11th day of March, 1935, because of the pain she was feeling. She slept for five nights at a house in Merlimau, where she made no complaint, and then went to Malacca, where she told a clerk in the Labour Office that she had been beaten by her step-father and step-mother. He took her to the Police Station and she there made a report in which she complained that the Appellant had raped her.

The medical evidence established that the injuries to the girl must have been caused before the date of her disappearance from her own house. The Appellant, in his evidence, denied having interfered with the girl, and suggested that she had falsely charged him because he used to beat and scold her for not doing her work properly. The girl, in her evidence, admitted that he used to beat her, but she bore no marks such as to suggest that he had done so immoderately.

Counsel for the Appellant based his appeal upon several grounds. He contended that the evidence of the Complainant was inadmissible,

inasmuch as she was not sworn. He relied upon the case of *Palaniandi* v. *The Public Prosecutor*, 2 F.M.S.L.R. 88, in which it was held that the evidence of a child who was not affirmed is inadmissible. That case, however, was decided in 1912, and since the amendment of the Oaths Ordinance the earlier decisions have no application. Section 5 (2) of Ordinance No. 48 (Oaths) now provides that:—

> "Any persons who by reason of immature age ought not in the opinion of the Court to be admitted to give evidence on oath or solemn affirmation shall be admitted to give evidence after being cautioned by the Court to speak the truth, the whole truth, and nothing but the truth."

This objection accordingly fails.

Mr. Goho next took the point that the Deputy Public Prosecutor did not cross-examine the Appellant. We do not think that such an omission would necessarily be sufficient by itself to justify the quashing of a conviction, but we desire to express our entire agreement with the view of the Court of Criminal Appeal in England, as stated in their judgment in *R.* v. *Hart*, 23 C.A.R., at page 207, that if on a crucial part of the case the prosecution intend to ask the jury to disbelieve the evidence of a witness, it is right and proper that that witness should be challenged in the witness-box, or, at any rate, that it should be made plain, while the witness is in the box, that his evidence is not accepted. That does not mean that there must be a cross-examination in detail. A few questions will generally suffice.

The other grounds of appeal were directed against the summing up of the learned Acting Chief Justice. It was complained that there was misdirection in two respects; firstly, in that he directed the jury that the strongest corroboration in a case like this would be an immediate complaint by the girl and, secondly in that he omitted to warn them of the danger of convicting upon the uncorroborated evidence of a girl only ten years of age. As regards the first of these points the passage in the summing up, which is complained of, reads as follows:—

> "One looks of course in a story like this for corroboration and the strongest corroboration is an immediate complaint."

As he went on to point out that there was no such immediate complaint in this case there can be no question of the jury having been misled to the detriment of the Appellant, but, as the admissibility and value of such a complaint were carefully argued before us, it seems desirable that we should express our opinion on the point. It is well-established law that upon the trial of an indictment for rape or other kindred offences against women or girls, the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence and the particulars of such complaint may, so far as they relate to the charge against the prisoner, be given in evidence on the part of the prosecution, not as being evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box [*see Reg.* v. *Lillyman*, (1896) 2 Q.B. 167]. But in England, as Lord Hewart, C.J. pointed out when delivering the judgment of the Court of Criminal Appeal in *R.* v. *Whitehead*, (1929) 1 K.B., at page 102, what the girl said could not amount to corroboration of her story, because it proceeded from the girl herself; it would be merely the girl's story at second hand. "In order that evidence may amount to corroboration it must be extraneous to the witness who is corroborated. A girl cannot corroborate herself."

In this Colony, however, the position is different inasmuch as section 157 of the Evidence Ordinance, which has no counterpart in the English law of evidence, provides that:

> "157. In order to corroborate the testimony of a witness, any former statement by such witness . . . . relating to the same fact at or about the time when the fact took place, . . . . may be proved."

The learned Acting Chief Justice was accordingly fully justified in referring to such an immediate complaint, if made, as corroboration, although in England it would not be so regarded. Such a complaint in order to be admissible as corroboration must be made "at or about the time" of the offence and its value and strength as corroboration must depend in every case upon the circumstances under which it is made.

As regards the second alleged misdirection, it is clear that in order that a conviction in a case of this description may stand the Court must be satisfied that the danger of convicting upon the uncorroborated evidence of the girl was present to the minds of the jury. In England it is expressly provided by statute that no person shall be convicted of an offence upon the unsworn testimony of a child of tender years unless that evidence is corroborated by some other material evidence in support thereof implicating the accused. In this Colony we have no corresponding statutory provision, so that a conviction based on such unsworn evidence is not necessarily illegal but we are of the opinion that we should hold, as the Johore Court of Appeal (composed of Huggard, C.J. and Gerahty, J.) did in *Lee Mion* v. *Public Prosecutor*, 3 Malayan Law Journal 124, that in the absence from our law of any statutory provision corresponding to that in force in England, the acceptance of the unsworn evidence of a child should be subject to the same principles or rules of practice as apply to the acceptance of the evidence of accomplices. The previously somewhat conflicting rulings as to these principles were considered by the Court of Criminal Appeal in 1916 in the case of *R.* v. *Baskerville*, 12 C.A.R. 81, and the rules laid down in the judgment of the Court, delivered by Lord Hewart, L.C.J. may be briefly stated thus:—

1. The uncorroborated evidence of an accomplice is admissible, and a conviction founded on such evidence is not illegal.

2. But it is a rule of practice virtually equivalent to a rule of law that the presiding judge must warn the jury of the danger of convicting on such evidence.

3. It is also his duty to tell them that nevertheless they can legally convict on such evidence.

4. When it appears that the judge has not given the required warnings, the Court of Appeal will quash the conviction.

5. One accomplice cannot corroborate another.

6. The corroboration must be evidence which implicates the accused. Evidence tending merely to shew that a crime has been committed is insufficient.

It is accordingly the clear duty of the Judge carefully to direct the jury that whilst it is open to them to do so yet it is dangerous to convict upon the unsworn evidence of a child or upon the evidence of accomplices, as the case may be, unless such evidence is corroborated in some material particulars implicating the accused. In the absence of such a direction or unless satisfied that in some other manner, such as we shall indicate later, this danger has been adequately brought to the notice of the jury, an Appellate Court would have no alternative but to quash the conviction. Where, however, the jury have been properly cautioned or where it is clear that they have otherwise had this danger properly brought to their notice and have nevertheless convicted, the Appellate Court will not disturb the conviction merely on the ground of lack of corroboration.

The passage in the summing-up which deals with the law reads as follows:—

"I think the learned Deputy put the law quite correctly to you in opening."

The only reference to the law which the Deputy Public Prosecutor made in his addresses to the jury was directed to the question of consent as a defence. He nowhere drew the attention of the jury to the danger of convicting without corroboration. In the argument which he addressed to us the learned Deputy submitted that as counsel for the defence in his final speech had quoted from an Indian text book a passage dealing with the danger of convicting in a case of rape upon the uncorroborated evidence of the woman, the point must have been sufficiently present to the minds of the jury when they were considering their verdict. But on that we would make two observations. The first is that the passage which counsel quoted does not fully state the law and the second is that even if it did that would not in our opinion be sufficient. It is true that in the case of *R.* v. *Peter Quinn*, 6 C.A.R. 270 the Court of Criminal Appeal refused to interfere with a conviction although they held that the summing-up by itself did not constitute a sufficient direction, but their ground for so refusing in that case was that counsel for the Crown had, both at the beginning and at the conclusion of his case, called attention to the importance of corroboration, and had read to the jury the direction which the Court of Criminal Appeal had approved in the earlier case of *R.* v. *Graham*, 4 C.A.R. 220.

The position is different when the only reference to an essential point of law has been made by defending counsel. As Lord Atkin observed in delivering the judgment of the Privy Council in *Lawrence* v. *The King*, (1933) A.C., at page 707, jurors are apt to be suspicious of law as propounded by the defence. In that case it was a question of direction as to onus of proof, but the same principles apply, and he puts the matter so admirably and concisely that we feel we cannot do better than quote the passage in full. It reads:—

"Before the Full Court the Crown had to fall back upon the contention that as the defence had laboured the question of onus and counsel for the prosecution had, while dealing with two of the counts, said the jury must give the accused the benefit of any reasonable doubt the defect in the summing-up was cured. Their Lordships cannot accept this view in this case. It often happens that the issues have been so clearly stated and agreed to by counsel on both sides that the trial judge and an Appellate Court is satisfied that the jury can have been under no misapprehension on the point of onus, and that further comment by the judge is unnecessary. But, speaking generally, it has to be remembered that it is an essential principle of our criminal law that a criminal charge has to be established by the prosecution beyond reasonable doubt; and it is essential that the tribunal of fact should understand this. Unless the judge makes sure that the jury appreciate their duty in this respect his omission is as grave an error as active misdirection on the elements of the offence, and a verdict of guilty given by the jury who have not taken this fundamental principle into account is given in a case where the essential forms of justice have been disregarded. In such a case, unless it can be predicated that properly directed the jury must have returned the same verdict, a substantial miscarriage of justice appears to be established. In the present case it appears to their Lordships quite insufficient that a statement on this point should have been made by counsel for the defence. Jurors are apt to be suspicious of law as propounded by the defence; they look to the judge for authoritative

statement of it, and in the present case there appears to be no sufficient ground for supposing that the jury had present to their minds the governing principle of our law as to onus of proof."

We are accordingly of the opinion that the jury were not properly directed on the question of corroboration. The learned Deputy Public Prosecutor raised the point as to whether such misdirection was a misdirection as to law or a misdirection as to evidence.

The importance of this distinction is that when misdirection as to law is established the conviction will be quashed unless the prosecution can shew that on a right direction the jury would or must inevitably have come to the same conclusion whereas misdirection as to the evidence to be of any avail to an appellant must be of such a nature and the circumstances of the case such that it is reasonably probable that the jury would not have returned their verdict had there been no misdirection. The burden of establishing such reasonable probability lies upon the appellant, not upon the prosecution. *R.* v. *Cohen and Bateman*, 2 C.A.R. 197, 207.

In our view this is a misdirection as to the law and inasmuch as we are not satisfied that on a right direction the jury must have come to the same conclusion, we allowed the appeal and quashed the conviction.

We have unfortunately no power to order a re-trial such as has been given to the Court of Criminal Appeal in at least one other Colony, namely, in Trinidad, and we feel the same regret as that expressed by Darling J. in delivering the judgment of the Court of Criminal Appeal in England in *R.* v. *Ellsom*, 7 C.A.R 8.

> "In this case we desire to repeat and to emphasize what the Lord Chief Justice has said on several occasions that it appears to us after some years' experience of the working of this Act—(the Criminal Appeal Act)—to be a matter of great regret that we have no power to order a new trial, as can be done on appeal in a civil case where a verdict is set aside on such grounds as those on which we feel bound to act today. In this Court if a sufficient legal reason is advanced against the conclusions of a judge and jury, we have no alternative but to quash the conviction, and no further proceedings can be taken. This is a case, like many others which have come before us where it is clearly desirable that all the facts should be submitted again to the jury with an adequate and proper direction. We hope that what we are now saying will be considered by those who have power to amend the law in this respect."

The trial was, in our opinion, also unsatisfactory by reason of the fact that the man Pusari, who was the only other person living in the house at the time the offences were alleged to have been committed, was not called as a witness, although he was produced in Court for the purpose of identification.

In a case of this description any person who may be able to throw light on the question of opportunity should be called as a witness even though his evidence may prove to be merely negative.

Although the point does not arise in this case we consider it desirable to add that in a case where the charge is that of an offence against a girl, and the girl is old enough to give evidence on oath, the proper direction would be as in *Graham's* case—4 C.A.R. 220. The judge should point out the risk of acting on the evidence of the girl unless corroborated, and, at the same time explain that, strictly speaking, the law does not require that her evidence should be corroborated, and that, if they believe the girl's evidence, they can act upon it.

*Appeal allowed.*

*Conviction quashed.*

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**END OF STRAITS SETTLEMENTS OFFICIAL REPORTS.**